BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARK R. GAULD)
Claimant)
VS.)
) Docket No. 158,876
KOCH ENGINEERING, INC.)
Respondent)
AND)
)
PACIFIC EMPLOYERS INSURANCE COMPANY)
Insurance Carrier)
AND)
)
KANSAS WORKERS COMPENSATION FUND)

ORDER

ON the 2nd day of December, 1993, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Shannon S. Krysl, dated November 29, 1993, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through his attorney, Martin E. Updegraff, of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Douglas C. Hobbs, of Wichita, Kansas. Having been dismissed from this claim, the Kansas Workers Compensation Fund did not appear. There were no other appearances.

RECORD

The record before the Appeals Board for its review in this appeal is the same as that record listed in the October 29, 1993 Award of the Administrative Law Judge.

STIPULATIONS

The Appeals Board hereby adopts for purposes of this appeal those stipulations listed in the October 29, 1993 Award Administrative Law Judge.

ISSUES

(1) Did claimant's neck injury arise out of and in the course of his employment.

(2) If the neck injury is a compensable injury, did the Administrative Law Judge properly combine the neck injury with claimant's forearm injury in her finding as to the percentage of disability?

The Appeals Board notes that whether respondent received proper notice of claimant's neck injury was also made an issue before the Administrative Law Judge. The Appeals Board here adopts the finding by the Administrative Law Judge that there was no showing of prejudice. The Appeals Board also adopts all other findings and conclusions of the Administrative Law Judge not inconsistent with those specific findings of the Appeals Board as hereinafter stated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) The Appeals Board finds that more probably than not claimant's neck injury did arise out of and in the course of his employment.

Claimant seeks compensation for disability resulting from a herniated cervical disc as well as carpal tunnel in his left wrist. He underwent surgery for both. Respondent does not dispute the compensability of the carpal tunnel condition. Respondent argues, however, claimant has not established that the neck injury arose out of and in the course of his employment.

At the time claimant first experienced the symptoms which led to this claim, he was working for respondent as a shear line operator. He worked at a point in the process where pieces of steel were cut and dropped onto a conveyor. The steel was then conveyed onto and stacked on a pallet. The pieces of steel weighed between 50 and 1500 pounds. As a part of his job he had to pull or twist the steel to assure that it landed properly on the pallet.

Respondent's argument against awarding compensation for the neck injury rests on two factors: (1) symptoms identified as neck symptoms did not appear for several months after claimant last worked for respondent; and (2) there were explanations for the neck problem other than claimant's employment. Respondent contends that the medical testimony relating claimant's neck injury to his employment activities was not based on an accurate or complete history.

There was, in fact, a substantial delay before either claimant or any of the treating physicians clearly identified claimant's neck problem. Claimant's first complaints of pain in his hand, arm and shoulder were in late January or February of 1991. Respondent sent him first to Dr. Raghaven, who prescribed anti-inflammatories and kept claimant off work for one week. When he returned to work his symptoms continued and respondent sent him to Dr. Wilkinson. After examining claimant's wrist, arm and shoulder, Dr. Wilkinson took him off work again and referred him to Dr. McClanahan, an upper extremity specialist. Dr. McClanahan ordered an EMG, diagnosed carpal tunnel syndrome in claimant's left wrist and referred claimant to his partner, Dr. Marvel, for surgery. Dr. Marvel performed carpal tunnel release in April of 1991.

Not until June of 1991, after his carpal tunnel surgery, did claimant complain of neck pain. His first recorded complaint, made to his chiropractor, was that he was having pain and thought he may have slept wrong on his neck. The chiropractor referred him to Dr. Klafta. From myelogram and CAT scan, Dr. Klafta, a neurosurgeon, diagnosed a herniated cervical disc and performed discectomy at the C6-7 level. Claimant experienced

immediate relief from his symptoms following surgery and was released to return to work in October of 1991.

In spite of the delay, the only physicians who give an opinion on the question, do relate claimant's neck injury to his work activities. Dr. Wilkinson testifies that when he saw claimant in March of 1991, claimant's symptoms were symptoms of carpal tunnel but they were not classical symptoms. He noted claimant also had upper extremity symptoms which concerned him to the extent that he wanted to rule out thoracic outlet syndrome. Dr. McClanahan also was concerned about brachialplexus involvement which could include both the median and ulnar nerves. Based upon these symptoms, Dr. Wilkinson concludes that the claimant probably had impingement on the nerve both in the cervical as well as the carpal tunnel area when he first saw the claimant, in March, 1991. Dr. Wilkinson testified it was his opinion that both were the result of claimant's work activities.

Dr. McClanahan, who gives no opinion as to the cause of the neck injury, does state that he felt, when he saw claimant in March of 1991, claimant had a two nerve involvement. He ordered an EMG and the report from the EMG indicated claimant had ulnar neuropathy. He nevertheless believed, based on the clinical findings, that claimant had carpal tunnel syndrome. He also suspected, however, claimant had a brachialplexus problem. He referred claimant to Dr. Marvel and at the time it was his opinion claimant had carpal tunnel syndrome in his left wrist.

Dr. Marvel, the physician who performed the carpal tunnel release, agrees that the cervical injury resulted from claimant's work activities. Dr. Marvel's testimony relates a rather confusing explanation for the progression of symptoms and history of claimant's cervical condition. Dr. Marvel did not agree with the conclusion in the EMG report that claimant had an ulnar neuropathy. He felt, instead, the test results were indicative of a median nerve and carpal tunnel condition. At the time of this deposition, however, Dr. Marvel stated that claimant probably had the cervical condition when he first saw claimant. He thought he also had carpal tunnel but that he may have simply missed the cervical condition. Although Dr. Marvel's explanation is somewhat confusing, it is not so lacking in credibility that it should be disregarded. See, Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). In short, the only medical opinions given do relate claimant's neck injury to his work activities.

Respondent suggests other events may have caused claimant's neck injury. The record includes the record of an emergency room visit indicating he had been run over by a horse in late January of 1991. At the same time respondent's records indicate he called in and was going to the emergency room after he hurt himself playing football with his children. It seems clear from the record this was the same emergency room visit. While this evidence does raise questions, it does not provide a more probable explanation for the claimant's neck injury. First, there is a similar lapse in time between this event and any complaint of neck pain. Second, the emergency room record shows he went only for problems with his low back and reflects an extended history of low back problems. The emergency room record shows neither complaint of pain in the neck nor the complaints relating to the wrists, arm or shoulder which the physicians subsequently related to the neck condition. There is no full explanation for this visit in the record. Claimant testified he did not recall this emergency room visit but acknowledges that he does have a recurring history of problems with his low back. He is not claiming they relate to his work activities.

The Appeals Board notes claimant also slipped and fell at work in late January or early February of 1991. He slipped on a spot of oil which had leaked from a forklift. He caught himself with his weight on his hands and arms. He testified he did have pain in his

left wrist from the fall but that he had already been having pain in his left hand before this fall. While the medical testimony indicated the fall would have been competent to cause the neck injury, neither claimant nor the medical experts attribute the injury directly or exclusively to this fall.

Finally, respondent introduced evidence of an emergency room visit in April of 1991, the day claimant had carpal tunnel surgery. Apparently on that same day, a tornado hit claimant's home in Andover, claimant went to the emergency room with muddy bandages and complained of wrist pain from lifting his children. There is no indication of neck injury found in the records. Again the occurrence does not give a more probable explanation for the neck injury.

After complete review of the record presented, the Appeals Board finds that more probably than not, claimant's neck injury did arise out of and in the course of his employment with the respondent. Two of the treating physicians who saw claimant in March and April of 1991 concluded, in spite of the delay in identifying it, claimant probably did have the cervical condition when they first saw him and his herniated disc most likely resulted from his work activities. The other referenced occurrences and emergency room visits do not provide a more likely explanation.

(2) The rating on the neck and forearm injuries should be combined to one body as a whole rating. Claimant is, therefore, awarded compensation for a 17.5 percent general body disability. For purpose of this award, March 5, 1991, should be used as the date of accident.

Disability evaluation and rating was done by Drs. Marvel, Klafta, and Schlachter. Dr. Marvel, the surgeon who performed the carpal tunnel surgery, rates claimant as having a ten percent functional impairment in the left hand or eight percent in the left upper extremity. He gives no rating for the neck injury. Dr. Klafta, the surgeon who performed the neck surgery, rates the disability resulting from the neck injury as 10 percent to 12 percent to the body as a whole. He does not rate for the forearm injury. Dr. Schlachter assigned 15 percent disability for the two level neck injury and 20 percent to the left upper extremity, which he converts to 12 percent to the body as a whole for the carpal tunnel condition. He then combines both to yield a body as a whole rating of 25 percent.

The Administrative Law Judge agreed with the eight percent rating given by Dr. Marvel relating to the carpal tunnel condition but averaged Dr. Klafta's 12 percent with Dr. Schlachter's 15 percent to arrive at 13.5 percent disability to the body as a whole for the neck injury. Although she did make both findings, she then awards only the 13.5 percent body as a whole disability.

The Appeals Board agrees with the two findings for the reasons stated in the Administrative Law Judge's Award, but also agrees with the argument made by claimant's counsel that there has been an oversight in the Award. It appears the claimant's injuries did not result from two accidents, but the same series of repeated work activities. Accordingly, the Appeals Board finds that the two ratings should be combined for one general body rating. Using the combined values chart from the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, Revised, the eight percent upper extremity converts to five percent general body and using the combined values chart the five percent and 13.5 percent combine to be 17.5 percent of the whole person. The Appeals Board, therefore, finds that claimant has a 17.5 percent disability to the body as a whole on a functional basis arising out of and in the course of his employment with the respondent.

Finally, the Appeals Board notes the Administrative Law Judge uses February 1, 1991, as the date of accident. It is true claimant testified he began having symptoms in late January or early February, 1991. Since claimant's injuries are determined to be the result of cumulative mini-traumas from repetitive work activities, the Appeals Board will consider the last date worked as the date of accident. The record does not reflect with any certainty the last date worked. Claimant has alleged in his application for hearing that the last date worked was approximately February 26, 1991. The evidence, from Ramona Griffith's testimony indicates that he was working as of March 5, 1991, because he left work early that day to see the company doctor. Since this is the latest date we are certain he worked, March 5, 1991, will be used for computation purposes.

AWARD

WHEREFORE, an award of compensation is hereby made in accordance with the above findings in favor of the claimant, Mark R. Gauld, and against respondent, Koch Engineering, Inc., and its insurance carrier, Pacific Employers Insurance Company, for accidental injury arising out of and in the course of claimant's employment. March 5, 1991, is used as the date of accident for compensation purposes.

With a stipulated wage of $418.80 per week, claimant is entitled to 23 weeks of temporary total disability at the rate of $278.00 per week, totaling $6,394.00, followed by 392 weeks at $48.86 per week, totaling $19,153.12 for a 17.5 percent permanent partial disability, making a total award of $25,547.12.

As of January 7, 1994, there would be due and owing to the claimant 23 weeks of temporary total at $278.00 per week in the sum $6,394.00 plus 125.57 weeks permanent partial compensation at $48.86 per week in the sum of $6,135.35, for a total due and owing of at that time of $12,529.35 with the remaining balance in the amount of $13,289.92 shall be paid at $48.86 per week for 266.43 weeks or until further order of the Director.

The claimant is entitled to unauthorized medical up to the statutory maximum.

Further medical benefits will be awarded only upon proper application to and approval by the Director.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

DON K. SMITH & ASSOCIATES

Deposition of Larry Wilkinson, M.D.		$ 371.50
Deposition of Ward A. McClanahan, M.D.		$ 193.00
Deposition of James Marvel, M.D.		$ 324.75
Deposition of Leonard Klafta, M.D.		$ 373.75
Deposition of Ernest R. Schlachter, M.D.		$ 167.25
Deposition of Mark R. Gauld		$ 368.50
	Total	$1798.75

BARBER & ASSOCIATES

Transcript of Regular Hearing	$ 67.90

DEPOSITION SERVICES

Deposition of Ramona Griffith	$ 121.20

IT IS SO ORDERED.

Dated this _____ day of January, 1994.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

cc: Martin E. Updegraff, 608 North Broadway, Wichita, Kansas 67214-3575
Douglas C. Hobbs, 301 North Main, Wichita, Kansas 67202
Shannon S. Krysl, Special Administrative Law Judge
George Gomez, Director